

No. 82600-5

J.M. JOHNSON, J. (concurring)—I concur with Justice Alexander’s majority opinion but fear that the opinion could be misconstrued as changing our view that officer and public safety concerns justify searches. I write separately to emphasize that the warrantless search of Mark Joseph Afana’s vehicle incident to the arrest of his passenger clearly would have been constitutional if the arresting officer perceived a threat to his safety. The arresting officer in this case appears to have felt secure during this arrest, but officers in similar situations—investigating suspicious activity in a car at 3:30 a.m. in a rural area—may have reasonable suspicion that their or the public’s safety is at risk. Such officers can constitutionally search the cars in question. *See State v. Smith*, 115 Wn.2d 775, 785, 801 P.2d 975 (1990) (officer may search for weapons in passenger compartment of vehicle if he has “reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle” (quoting *State v.*

*Williams*, 102 Wn.2d 733, 738-39, 689 P.2d 1065 (1984)); *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986) (limited search of car permitted when necessary to ensure officer safety). The United States Supreme Court has agreed and also included the safety of persons other than the officer as a justification for searches. *See Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (search authorized if suspicion of danger to officer or others applies to any individual involved, whether or not the individual is the arrestee).

Only because the arresting officer in this case reported no suspicion or fear that either Afana or his passenger was dangerous or may have obtained weapons from the car, the majority properly found the warrantless search unconstitutional under article I, section 7 of the Washington Constitution. However, if an officer reasonably perceives a safety threat, a search is lawful under the United States and Washington Constitutions.

AUTHOR:

Justice James M. Johnson

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WE CONCUR:

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